

LEGISLATIVE BILL 735

Approved by the Governor May 13, 2003

Introduced by Kremer, 34; Baker, 44; Burling, 33; Schrock, 38; Erdman, 47

AN ACT relating to grain; to amend sections 75-901, 75-902, 88-525 to 88-528, 88-530, 88-536, and 89-1,104.01, Reissue Revised Statutes of Nebraska, and sections 75-156 and 75-903, Revised Statutes Supplement, 2002; to change provisions relating to the Public Service Commission, grain warehousemen, grain dealers, and grain moisture measuring devices; to provide for civil penalties; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 75-156, Revised Statutes Supplement, 2002, is amended to read:

75-156. (1) In addition to other penalties and relief provided by law, the Public Service Commission may, upon a finding that the violation is proven by clear and convincing evidence, assess a civil penalty of up to ten thousand dollars per day against any person, motor carrier, regulated motor carrier, common carrier, ~~or~~ contract carrier, grain dealer, or grain warehouseman for each violation of (a) any provision of sections 75-301 to 75-390 administered by the commission or section 75-126 as such section applies to any person or carrier specified in sections 75-301 to 75-390, (b) a commission order entered pursuant to the Automatic Dialing-Announcing Devices Act, the Emergency Telephone Communications Systems Act, the Intrastate Pay-Per-Call Regulation Act, the Nebraska Telecommunications Regulation Act, the Nebraska Telecommunications Universal Service Fund Act, or the Telecommunications Relay System Act, (c) any term, condition, or limitation of any certificate or permit issued by the commission pursuant to sections 75-301 to 75-390, ~~or~~ (d) any rule, regulation, or order of the commission issued under authority delegated to the commission pursuant to sections 75-301 to 75-390, or (e) any rule, regulation, or order of the commission issued under the authority delegated to the commission pursuant to the Grain Dealer Act or the Grain Warehouse Act. The civil penalty assessed under this section shall not exceed two million dollars per year for each violation. The amount of the civil penalty assessed in each case shall be based on the severity of the violation charged. The commission may compromise or mitigate any penalty prior to hearing if all parties agree. In determining the amount of the penalty, the commission shall consider the appropriateness of the penalty in light of the gravity of the violation and the good faith of the violator in attempting to achieve compliance after notification of the violation is given.

(2) Upon notice and hearing in accordance with this section and section 75-157, the commission may enter an order assessing a civil penalty of up to one hundred dollars against any person, firm, partnership, limited liability company, corporation, cooperative, or association for failure to file an annual report as required by section 75-116 and as prescribed by commission rules and regulations or for failure to register as required by section 86-125 and as prescribed by commission rules and regulations. Each day during which the violation continues after the commission has issued an order finding that a violation has occurred constitutes a separate offense. Any party aggrieved by an order of the commission under this section, except an order assessing a civil penalty issued under subdivision (1)(b) of this section, has the rights of appeal set forth in section 75-136.01. For an order assessing a civil penalty issued under subdivision (1)(b) of this section, any party aggrieved may appeal. The appeal shall be in accordance with the Administrative Procedure Act.

(3) When any person or party is accused of any violation listed in this section, the commission shall notify such person or party in writing (a) setting forth the date, facts, and nature of each act or omission upon which each charge of a violation is based, (b) specifically identifying the particular statute, certificate, permit, rule, regulation, or order purportedly violated, (c) that a hearing will be held and the time, date, and place of the hearing, (d) that in addition to the civil penalty, the commission may enforce additional penalties and relief as provided by law, and (e) that upon failure to pay any civil penalty determined by the commission, the penalty may be collected by civil action in the district court of Lancaster County.

Sec. 2. Section 75-901, Reissue Revised Statutes of Nebraska, is amended to read:

75-901. Sections 75-901 to 75-909 and sections 5 and 6 of this act shall be known and may be cited as the Grain Dealer Act.

Sec. 3. Section 75-902, Reissue Revised Statutes of Nebraska, is amended to read:

75-902. For purposes of the Grain Dealer Act, unless the context otherwise requires:

- (1) Commission means the Public Service Commission;
- (2) Grain includes, but is not limited to, all unprocessed beans, whole corn, milo and other sorghum, wheat, rye, barley, oats, millet, safflower seed and processed plant pellets, alfalfa pellets, and any other bulk pelleted agricultural storable commodity, except grain which has been processed or packaged for distribution as seed;
- (3) Grain dealer means any person, partnership, limited liability company, corporation, or association, other than a custom feeder of livestock or poultry, or a state grain warehouse licensed in Nebraska, or a grain warehouse located in Nebraska which is licensed under the Grain Warehouse Act or located in Nebraska and licensed under the United States Warehouse Act that does not buy, sell, or transport grain other than grain that is received at its licensed warehouse facilities, who (a) buys grain from its owner or producer within this state for purposes of selling such grain, (b) transports grain into this state for purposes of selling such grain, or (c) acts as an employee or agent of a buyer or seller for purposes of collective bargaining in the marketing of grain; and
- (4) Producer means the owner, tenant, or operator of land in this state who has an interest in and receives all or part of the proceeds from the sale of grain produced on that land.

Sec. 4. Section 75-903, Revised Statutes Supplement, 2002, is amended to read:

75-903. All grain dealers doing business in this state shall be licensed by the commission. If the applicant is an individual, the application shall include the applicant's social security number. To procure and maintain a license, each grain dealer shall:

- (1) Pay an annual fee of thirty dollars which shall be due on or before the date established by the commission for each license and a registration fee not to exceed twenty dollars per year for each vehicle used by such licensee to transport grain. Such fees shall be paid to the State Treasurer and credited to the state General Fund;
- (2) Equip each vehicle used by the licensee for grain transportation with a commercial license plate registered with the Department of Motor Vehicles, except that a licensee who resides in another state shall license such vehicles according to the laws of his or her state of residence;
- (3) Affix a grain dealer plate issued by the commission to each vehicle used by the licensee;
- (4) File security which may be a bond issued by a corporate surety company and payable to the commission, an irrevocable letter of credit, or a certificate of deposit, subject to the approval of the commission, for the benefit of any producer or owner within this state who files a valid claim arising from a sale to or purchase from a grain dealer. The security shall be in the amount of thirty-five thousand dollars or seven percent of grain purchases by the grain dealer in the preceding license year, ~~as reported on a form prescribed by the commission,~~ whichever is greater, not to exceed ~~one hundred fifty~~ three hundred thousand dollars. Such security shall be furnished on the condition that the licensee will pay for any grain purchased upon demand, not later than thirty days after ~~taking possession of the grain purchased~~ the date of the last shipment of any contract. The liability of the surety shall cover purchases and sales made or arranged by the grain dealer during the time the bond is in force. A grain dealer's bond filed with the commission shall be in continuous force and effect until canceled by the surety. The liability of the surety on any bond required by this section shall not accumulate for each successive license period during which the bond is in force; and
- (5) ~~File, as the commission may by rule or regulation require, a financial statement of the licensee's operations as a grain dealer a reviewed or audited fiscal year-end financial statement prepared by a person or firm which holds a permit granted by the Nebraska State Board of Public Accountancy. If licensing as an individual, the financial statement shall be prepared in accordance with Other Comprehensive Basis of Accountancy, as filed with the board, for a personal financial statement, using historical cost and accrual basis of accounting. If licensing as a partnership, corporation, or limited liability company, the financial statement shall be prepared in conformity with accounting principles generally accepted in the United States. The financial statement shall include:~~ (a) A statement of income showing

profit or loss; (b) a balance sheet; (c) a statement of cash flow; (d) a statement of proprietor's capital or retained earnings; (e) the volume and dollar value of the grain purchases the licensee made in Nebraska during the fiscal year; and (f) the accountant's certification, assurances, opinions, and comments and the notes with respect to the financial statement. If the volume and dollar value of the grain purchases is not reported, the grain dealer shall file the maximum grain dealer security as required by the Grain Dealer Act.

If an applicant for a grain dealer license is a wholly owned subsidiary of a parent company and such a financial statement is not prepared for the subsidiary, the parent company shall submit its reviewed or audited fiscal year-end financial statement and shall execute an unconditional guarantee agreement as prescribed by the commission.

Sec. 5. For each application filed under section 75-903 after January 1, 2004, one of the following primary parties shall be subject to fingerprinting and a check of his or her criminal history record information maintained by the Federal Bureau of Investigation through the Nebraska State Patrol: (1) If the applicant is not an individual, the chief executive officer, president, or general manager; or (2) if the applicant is an individual, the individual. If the primary party has been subject to a check of his or her criminal history record information pursuant to this section on a prior application, he or she is not subject to another such check upon a subsequent application. A primary party shall furnish to the Nebraska State Patrol a full set of fingerprints to enable a criminal background investigation to be conducted. The primary party shall request that the Nebraska State Patrol submit the fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The primary party shall pay the actual cost, if any, of the fingerprinting and check of his or her criminal history record information. The primary party shall authorize release of the national criminal history record check to the commission. The criminal history record information check shall be completed within ninety days after the date the application for a license is received in the commission's office, and if not, the application shall be returned to the applicant. The commission shall deny a grain dealer license to any applicant whose primary party has been convicted of a felony financial crime.

Sec. 6. The commission may assess a civil penalty, pursuant to section 75-156, against any person who violates the Grain Dealer Act.

Sec. 7. Section 88-525, Reissue Revised Statutes of Nebraska, is amended to read:

88-525. Sections 88-525 to 88-552 and sections 11, 13, and 15 of this act shall be known and may be cited as the Grain Warehouse Act.

Sec. 8. Section 88-526, Reissue Revised Statutes of Nebraska, is amended to read:

88-526. As used in the Grain Warehouse Act, unless the context otherwise requires:

(1) Commission shall mean the Public Service Commission;

(2) Grain shall mean wheat, corn, oats, soybeans, barley, rye, flax, or sorghum which has not been processed or packaged for the purpose of distribution as seed, including, but not limited to, edible beans, whole corn plant pellets, alfalfa pellets, millet, sunflower seed, safflower seed, and any other bulk pelleted agricultural storable commodity;

(3) Grain in storage shall mean any grain which has been received at any warehouse for which the actual sale price is not fixed and payment is not made within thirty days after the receipt of the grain and to which title has not been transferred to the warehouseman by signed contract or priced scale ticket;

(4) Warehouse shall mean any grain elevator, mill, grist mill, building, or receptacle in which grain is held in storage for more than ten consecutive days;

(5) Warehouse licensee shall mean any warehouseman who is licensed pursuant to the Grain Warehouse Act; and

(6) Warehouseman shall mean any person, partnership, limited liability company, corporation, or association who (a) receives grain for storage or stores or offers to store grain for legal consideration for another person, partnership, limited liability company, corporation, or association in a warehouse where delivered or (b) receives grain for shipment to other points for storage, consignment, or resale either in or out of this state.

Sec. 9. Section 88-527, Reissue Revised Statutes of Nebraska, is amended to read:

88-527. (1) No person shall operate a warehouse nor act as a warehouseman without a license issued pursuant to the Grain Warehouse Act. Warehouses, except warehouses which are licensed under the United States

Warehouse Act, shall be licensed and regulated by the commission. If the applicant is an individual, the application shall include the applicant's social security number. Such warehouses shall be inspected by the commission at least once every twelve months.

(2) If the commission determines that additional examinations are necessary after a regular examination is completed at a warehouse, the commission may charge such warehouse for the cost of the additional examinations according to the commission's fee schedule. Warehouses shall only be charged if such examinations are for reasons of irregularities from the previous examination or if financial conditions warrant additional examinations.

(3) The commission may make available to the United States Government or any of its agencies, including the Commodity Credit Corporation, the results of inspections made and inspection reports submitted by employees of the commission upon payment of such fees as may be determined by the commission. The fees shall cover the actual cost of the services rendered in regard to providing the information.

~~(3)~~ (4) The commission may charge for inspections conducted at the request of a warehouse licensee. The commission may assess a surveillance fee against the assets of a warehouse licensee for actual expenses incurred by the commission in suspending a license or terminating the operations of a warehouse licensee. The commission may enter into contracts for such purpose and shall keep a record of all surveillance fees collected. All surveillance fees collected by the commission shall be deposited in the Nebraska Grain Warehouse Surveillance Cash Fund.

~~(4)~~ (5) The commission may enter into agreements and contracts with regulators in states which border Nebraska for the purpose of licensing or examining any public grain warehouseman which operates facilities in such states. The commission shall assume all jurisdiction over any warehouseman headquartered in Nebraska regarding his or her warehouse activity. A warehouseman headquartered and licensed in another state which acquires facilities in Nebraska is under the jurisdiction of the headquarter state under the terms of such agreement or contract.

Sec. 10. Section 88-528, Reissue Revised Statutes of Nebraska, is amended to read:

88-528. Each applicant for a license and each warehouse licensee shall annually file an application with the commission and shall submit to a criminal background check as set forth in section 11 of this act. The application shall be in the form prescribed by the commission to do business under the Grain Warehouse Act and shall include a ~~report of an audit or review~~ an audited or reviewed fiscal year-end financial statement prepared in accordance with generally accepted accounting practices in the United States ~~and conducted~~ by a person or firm which holds a permit granted by the Nebraska State Board of Public Accountancy. If the applicant files a reviewed fiscal year-end financial statement, the applicant shall also provide additional security pursuant to section 88-530 in such amount as the commission requires. If licensing as an individual, the financial statement shall be prepared in accordance with Other Comprehensive Basis of Accountancy, as filed with the board, for a personal financial statement, using historical cost and accrual basis of accounting. The financial statement ~~Each report~~ shall include: ~~7~~ but not be limited to, the following: (1) A balance sheet; (2) a statement of income showing profit or loss; (3) a statement of retained earnings; (4) a statement of changes in the financial position; and (5) the accountant's certifications, assurances, opinions, comments, and notes with regard to such ~~report~~ financial statement. Such application shall set forth the location of the warehouse to be used by the applicant, its relation to railroad trackage, its capacity, its general plan and equipment, and its ownership.

If an applicant for a license is a wholly owned subsidiary of a parent company and such a financial statement is not prepared for the subsidiary, the parent company shall submit its audited fiscal year-end financial statement and shall execute an unconditional guarantee agreement as prescribed by the commission.

Sec. 11. For each application filed under section 88-528 after January 1, 2004, one of the following primary parties shall be subject to fingerprinting and a check of his or her criminal history record information maintained by the Federal Bureau of Investigation through the Nebraska State Patrol: (1) If the applicant is not an individual, the chief executive officer, president, or general manager; or (2) if the applicant is an individual, the individual. If the primary party has been subject to a check of his or her criminal history record information pursuant to this section on a prior application, he or she is not subject to another such check upon a subsequent application. A primary party shall furnish to the Nebraska State

Patrol a full set of fingerprints to enable a criminal background investigation to be conducted. The primary party shall request that the Nebraska State Patrol submit the fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The primary party shall pay the actual cost, if any, of the fingerprinting and check of his or her criminal history record information. The primary party shall authorize release of the national criminal history record check to the commission. The criminal history record information check shall be completed within ninety days after the date the application for a license is received in the commission's office, and if not, the application shall be returned to the applicant. The commission shall deny a warehouse license to any applicant whose primary party has been convicted of a felony financial crime.

Sec. 12. Section 88-530, Reissue Revised Statutes of Nebraska, is amended to read:

88-530. Each applicant shall show sufficient net worth or stockholders' equity to conform with the financial requirements which the commission shall establish by the adoption and promulgation of rules and regulations. Applicants shall file with the commission security in the form of a bond, a certificate of deposit, an irrevocable letter of credit, United States bonds or treasury notes, or other public debt obligations of the United States which are unconditionally guaranteed as to both principal and interest by the United States in such sum as the commission may require and in the form and of the kind prescribed by the commission. The security shall be in an amount set by the commission pursuant to rules and regulations, but shall not be less than one thousand dollars for any warehouse licensee who receives grain from producers in wagon or truckload lots and not less than twenty-five thousand dollars. ~~for those who receive grain in earload lots.~~ The security shall run to the State of Nebraska for the benefit of each person who stores grain in such warehouse and of each person who holds a check for purchase of grain stored in such warehouse which was issued by the warehouse licensee not more than five business days prior to the cutoff date of operation of the warehouse, which shall be the date the commission officially closes the warehouse. The security shall be conditioned upon (1) the warehouse licensee carrying combustion, fire, lightning, and tornado insurance sufficient to cover loss upon all stored grain in such warehouse, (2) the delivery of the grain upon surrender of the warehouse receipt, and (3) the faithful performance by the warehouse licensee of all provisions of law relating to the storage of grain by such warehouse licensee and rules and regulations adopted and promulgated by the commission. The commission may require increases in the amount of the security from time to time as it may deem necessary for the protection of the storers. For an applicant who has filed a reviewed fiscal year-end financial statement pursuant to section 88-528, the commission shall require additional security in an amount set by the commission pursuant to rules and regulations, which shall not be less than twenty-five thousand dollars and not more than five hundred thousand dollars. The surety on a bond shall be a surety company licensed by the Department of Insurance. An irrevocable letter of credit or certificate of deposit shall be issued by a federally insured depository institution.

The security shall particularly describe the warehouse intended to be covered by the security. The liability of the surety on a bond shall not accumulate for each successive license period which the bond covers. The liability of the surety shall be limited to the amount stated on the bond or on an appropriate rider or endorsement to the bond.

Sec. 13. In addition to the audited or reviewed fiscal year-end financial statement required by section 88-528 and to detect noncompliance with financial requirements established by the commission pursuant to section 88-530, the commission shall, for good cause shown as determined by criteria set forth in commission rules and regulations, require (1) a verified report of the total grain inventory or (2) an audited financial statement. A verified report of grain inventory or audited financial statement shall be prepared in accordance with generally accepted accounting practices in the United States by a person or firm which holds a permit granted by the Nebraska State Board of Public Accountancy.

Sec. 14. Section 88-536, Reissue Revised Statutes of Nebraska, is amended to read:

88-536. (1) Within fifteen days after demand by the owner or deliverer of any grain to a warehouse for storage, the warehouse licensee shall issue a lawful negotiable or nonnegotiable receipt to such owner or deliverer of such grain. The receipt shall state the date of delivery, the name of the owner, and the grade, gross weight, dockage, and net weight of the grain represented in the receipt.

(2)(a) The commission shall prepare forms for such receipts which

shall be used by all warehouse licensees and registered and may adopt procedures for the electronic issuance of such receipts. All warehouse licensees shall either use forms prepared by the commission for such receipts or follow procedures adopted by the commission for electronic issuance of such receipts. Warehouse licensees that use forms prepared by the commission shall register such receipts with the commission.

(b) The commission shall fix charges to be assessed and collected for such warehouse receipt forms not to exceed the cost of printing, delivering, and handling. Payment of such charges shall be made in advance of delivery of such receipt forms and shall entitle each such receipt to registration without any further charge or fee. The commission may make refunds of such charges for such unused receipt forms as may be returned to the commission.

(c) All procedures for electronic filing of receipts adopted by the commission shall comply with section 86-611. The commission may adopt authentication procedures to verify receipts issued electronically. Compliance with the authentication procedures adopted by the commission shall have the same validity as a signature on any receipt.

(3) Any warehouse licensee may issue a receipt to himself or herself as the owner of grain stored in his or her own warehouse, which receipt shall be registered with the commission. Upon receiving any such grain warehouse receipt for registration and being satisfied that the provisions of the Grain Warehouse Act and any rules and regulations adopted and promulgated pursuant to the act have been complied with, the commission shall cause such receipt to be registered.

Sec. 15. The commission may assess a civil penalty, pursuant to section 75-156, against any person who violates the Grain Warehouse Act.

Sec. 16. Section 89-1,104.01, Reissue Revised Statutes of Nebraska, is amended to read:

89-1,104.01. The fees charged pursuant to section 89-1,104 shall be remitted by the Public Service Commission to the State Treasurer. The State Treasurer shall credit the first twenty thousand dollars of such fees to the Moisture Testing Examination Fund, which fund is hereby created. The fund shall be appropriated to the Public Service Commission to purchase or repair moisture field and laboratory equipment be used to cover the costs associated with the grain moisture measuring devices program. The money in such fund may be used at any time by the commission. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

The State Treasurer shall credit any fees in excess of twenty thousand dollars to the General Fund. If at any time the funds in the Moisture Testing Examination Fund drop below twenty thousand dollars, the fees remitted by the Public Service Commission to the State Treasurer shall be credited to the Moisture Testing Examination Fund until such fund has a balance of twenty thousand dollars.

Sec. 17. Original sections 75-901, 75-902, 88-525 to 88-528, 88-530, 88-536, and 89-1,104.01, Reissue Revised Statutes of Nebraska, and sections 75-156 and 75-903, Revised Statutes Supplement, 2002, are repealed.